Supreme Court, U.S.
FILED

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Supreme Court of the United States
OCTOBER TERM 1997

NO. _____

CAROLEE A. MEDICO,

Petitioner,

V.

CHARLES P. MEDICO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit, by its Judgment-Order entered February 6, 1997, at No. 96-7138, abuse its discretion and err, in affirming a final Order of the United States District Court for the Middle District of Pennsylvania, entered February 1, 1996, at 95-0834, which dismissed the petitioner's pro se section 1983 Civil Rights Action?

2. Would the defendants in this case be prejudiced by permitting petitioner to file a second amended complaint?

3. Did the District Court misunderstand or misapprehend that the subject of the petitioner's express intent to amend and motion for reconsideration was the petitioner's second amended complaint?

4. Does justice require that the petitioner be freely permitted the opportunity file a second amended complaint?

PARTIES TO THE PROCEEDING

Petitioner is Carolee A. Medico. Respondents are: Charles P. Medico, Lawrence D. MacDonald, Patrick J. Toole, Jr., Thomas A. Makowski, Suzan Latona, Chester Muroski, Correale Stevens, Donald O'Malley, Kathryn Davis, Sandor Yelen, Maxine Williams, Hugh F. Mundy, Eugene Duffy, Anthony Terraciano, First Fidelity Bank, N.A., Pennsylvania, Robert E. Colville, Michael J. DiMarco and Donald D. Dolbin.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1997

NO.

CAROLEE A. MEDICO,

Petitioner,

V.

CHARLES P. MEDICO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Carolee A. Medico, respectfully prays that a writ of certiorari issue to review the Judgment-Order of the United States Court of Appeals for the Third Circuit entered February 6, 1997 in case No. 96-7138.

OPINIONS BELOW

The unreported Judgment-Order of the United States Court of Appeals for the Third Circuit was entered on February 6, 1997. *See,* Appendix (App.) A at 1a. The District Court's unreported memorandum opinion and order, which is at issue, was entered on February 1, 1996. That decision is unreported, but respectfully attached as Appendix B at 2a. After considering the petitioner's timely motion for reconsideration, the District Court entered a subsequent opinion and order dated April 10, 1996, which denied reconsideration. That decision is unreported but respectfully attached as Appendix C at 20a.

JURISDICTION

The judgment of the Court of Appeals was entered by a Judgment-Order issued on February 6, 1997. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1).

The Petitioner respectfully certifies that pursuant to Supreme Court Rule No. 13, this petition is timely filed within 90 days of the judgment sought to be reviewed.

STATUTES INVOLVED

This case involves application of Rule 15(a) of the Federal Rules of Civil Procedure; which states in part:

> .... a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT SHOWING ORIGINAL FEDERAL JURISDICTION

Federal jurisdiction in the first instance was based on 28 U.S.C. §1983 (civil rights), 28 U.S.C. §1343 (injunctive relief), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1361 (mandamus).

STATEMENT OF THE CASE

The District Court's memorandum opinion and order, which is at issue, was entered on February 1, 1996. Upon more than a dozen motions to dismiss, the District Court dismissed the petitioner's complaint for failure to plead her Section 1983 action to show some form of "state action" and particularly, identification of the respondents' specific personal conduct, and the time and place of that conduct; and regarding the judicial and prosecutorial respondents, the District Court held that these judges and prosecutors were immune from suite based upon the Doctrines of Judicial Immunity and Comity.

Thereafter, on April 10, 1996, in denying reconsideration, the District Court indicated:

> [Petitioner] fails to note that the court has permitted her to amend her complaint, and that the court was, in fact, ruling on the amended complaint." *See,* App. C, at 21a.

Thus, the District Court plainly misunderstood or misapprehended that the subject of the petitioner's express intent to amend and motion for reconsideration was the petitioner's *second amended complaint.* Hence, the filing

of petitioner's motion to amend and second amended complaint was improvidently and abruptly foreclosed on February 1, 1996 by the District Court's Order of dismissal of the petitioner's complaint.

The essence of the issues in this case are simple and straightforward regarding the petitioner's collective response to the respondents' various motions to dismiss; where (1) the petitioner plainly conceded that her amended complaint was technically defective regarding factual specificity and (2) the petitioner signaled and made the District Court and all parties aware of her express intention to seek the District Court's permission to file a second amended complaint. The chronology in need of telling is as follows:

On May 26, 1995, the petitioner filed and served a pro se complaint alleging civil rights deprivations against former spouse, respondent Charles P. Medico, various state actors, and their agents, alleging conspiracy and civil rights deprivations.

On September 5, 1995, the petitioner filed an amended complaint; and thereafter, upon the District Court's instruction, promptly filed movement for leave to serve same, and for issuance of civil summons. *(Vanaskie, J.)*.

On September 8, 1995, the District Court entered an Order granting the petitioner leave to serve the amended complaint and issued summons upon the respondents. *(Vanaskie, J.)*.

On October 3, 1995, United States District Judge

Thomas I. Vanaskie entered an Order recusing himself from the case, stating that the law firm in which he was a shareholder while in the private practice of law when he took office had filed an entry of appearance, and it was therefore appropriate that Judge Vaneskie recuse himself. *(Vanaskie, J.).*

On October 4, 1995, Chief Judge Sylvia H. Rambo became the trial court in this case.

The record shows that on November 29, 1995, after a telephone case management conference, Chief Judge Sylvia H. Rambo entered an order directing that:

1. All discovery was stayed until further order of court.

2. All motions will be addressed when ripe.

3. A case management order will be issued, if necessary, upon disposition of all motions currently pending before the court.

4. No amended complaint shall be filed except upon leave of court.

On February 1, 1996, United States District Judge Sylvia H. Rambo dismissed the complaint; and thereafter the petitioner timely filed movement for reconsideration.

On April 10, 1996, in denying reconsideration, Chief Judge Rambo wrote, *inter alia,* that two issues

raised by the petitioner merited discussion. The first, was that the petitioner contended that it was error for the District Court to dismiss her civil rights complaint because the petitioner was proceeding pro se. Judge Rambo indicated, *inter alia,* that:

> Plaintiff fails to note that the court has permitted her to amend her complaint, and that the court was, in fact, ruling on the amended complaint. App. C at 21a.

It is clear from the case chronology and from Judge Rambo's case management order that on November 29, 1995, the petitioner plainly made the District Court and all parties affirmatively aware that she intended to file a second amended complaint. While U.S. District Judge Thomas I. Vanaskie had previously granted the petitioner an opportunity to amend her complaint; it was plainly the question of a *second amended complaint* which was placed squarely before Judge Rambo at the time of the telephone case management conference of November 29, 1995, when the petitioner expressly informed the District Court and all the respondents that she intended to file a second amended complaint. Plainly then, the District Court erred and misapprehended or misconstrued that the petitioner's request for amendment related to the question of a second amended complaint. Therefore, the petitioner should have first been granted the opportunity to amend her complaint for a second time within a reasonable period as fixed by the District Court.

The conclusion is inescapable that the dismissal Order of February 1, 1996, came squarely within the ambit of Rule 15 of the Federal Rules of Civil Procedure

and *Kauffman v. Moss,* 420 F.2d 1270, Cert. Denied, 400 U.S. 846 (1970).

On February 1, 1995, without first granting the petitioner an opportunity to freely amend her complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, the District Court entered a dispositive Order granting all motions to dismiss with prejudice to renew, and directed the clerk of court to close the file herein.

REASONS FOR GRANTING THE WRIT

Rule 15 of the Federal Rules of Civil Procedure requires that amendments to pleadings be freely permitted when justice so requires. The District Court did not consider that the respondents would not be prejudiced by permitting the petitioner the opportunity to file a second amended complaint; nor that the case would not have been delayed by permitting such second successive amendment.

The principal test for prejudice is whether the opposing defendants would be denied a fair opportunity to defend and to offer evidence on the theory advanced in the second amended complaint. Because this case had barely commenced, because discovery had not yet commenced and because no new theory would be offered in the second amendment complaint, the respondents can not be heard to complain that they would be prejudiced or that undue delay would result. *Evans Products Company v. West American Insurance Company,* 736 F.2d 920 (3d Cir. 1984).

Furthermore, where a plaintiff pursues amendment of her complaint timely, properly and responsibly, the denial of the opportunity to amend would be appropriate

only if there were no legal basis for the amendment. *Wedgeworth v. Fibreboard Corporation,* 706 F.2d 541 (5th Cir. 1983).

In this case, the petitioner plainly raised the prospect of filing a second amended complaint early on in her timely responses to the respondents' various motions for dismissal and motions for a more definitive statement. Again on November 29, 1995, during the telephone case management conference held with the respondents' participation, and represented by counsel, the petitioner indicated to the District Court and to all the respondents her express intent to file a second amended complaint; whereupon the District Court plainly acknowledged the petitioner's intent to file a second amended complaint, and instructed the petitioner that she must first seek leave of court before filing her second amended complaint and that she must attach a copy of the proposed second amended complaint to her movement seeking leave to amend.

Immediately after the telephone case management conference, on the same day and date, the District Court issued an Order directing, *inter alia,* that, "No amended complaint shall be filed except upon leave of court."

Respondents claimed in their motions for dismissal and for a more definitive statement that the petitioner failed to state a claim upon which relief can be granted. While the petitioner in her amended complaint specifically alleged that the respondents had conspired together to violate her civil rights, the respondents had latched onto certain statements in the amended complaint which, in all fairness, could be taken to be either unclear or ambiguous.

From November 29, 1995, the petitioner earnestly sought to file her second amendment to be certain that there was neither confusion nor misunderstanding concerning her cause of action; and to render moot the respondent's various motions for dismissal and for a more definitive statement.

The petitioner's second amendment would relate back to the date the lawsuit was filed. If it did not, the plaintiff's claim might be barred by the applicable two-year statute of limitations, as contended by the respondents. The courts look to the "operative facts" set forth or attempted to be set forth in the complaint to determine whether the original complaint gave the respondents notice regarding the claim or defense that is now asserted in the amended pleading. *Hooper v. Sachs,* 618 F.Supp. 963 (D.Md. 1985). An amended complaint will relate back if it is based on facts the same or similar to those alleged in the original complaint. There must be a factual nexus between the original and the Amended Complaint. *Id.* Even a new cause of action will relate back if the defendants' conduct relied upon to support the original complaint is factually similar to the conduct relied on to support the amended complaint. *Id.*

In the case of *United States v. Somers Construction Company,* 184 F.Supp. 563 (D.Del. 1959), the court quoted *Tilton v. Cofield,* 93 U.S. 163 (1876), that, "allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice."

The court also quoted 3 Moore's Federal Practice (2d Ed.) § 15.08:

> The entire spirit of the rules is to the effect that controversy shall be decided on the

> merits, [and] the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the party has not been guilty of bad faith, is not acting for purposes of delay, the opposing party will not be unduly prejudiced or the trial of the issues unduly delayed.

Finally, in *Somers Construction*, the court quoted *Tiller v. Atlantic Coast Line*, 323 U.S. 574 (1945) to the effect that:

> There is no reason to apply a statute of limitations when, as here, the Respondent has had notice from the beginning that Petitioner was trying to enforce a claim against it.

While petitioner agrees that civil rights complaints must be specifically pleaded to avoid dismissal, *Kauffman v. Moss, supra*, this rule does not subvert this Honorable Court's liberal policy favoring amendment of complaints, and such rule must be balanced against the equally important policies that pro se litigants not be denied the opportunity to state a civil rights claim because of technicalities and that litigation should be decided on the merits where possible. *Kauffman v. Moss, supra.* 42 U.S.C. §§ 1983, 1985; Fed.Rules Civ.Proc. rule 15(a).

In *Kauffman*, the Court held that, "it was error to dispose of the complaint by a motion to dismiss on the ground of estoppel." *Kauffman*, 420 F.2d at 1275. The Court stated that, "it is apparent that the complaint should not have been dismissed provided a claim for relief was otherwise properly stated. The district court in its

memorandum opinion characterized appellant's complaint as a "series of conclusionary allegations unsupported by facts." *Kauffman*, 420 F.2d at 1275.

However, squarely addressing the issue requiring that complaints in civil rights cases must be specifically pleaded in order to avoid a motion to dismiss, citing *Negrich v. Hohn*, 379 F.2d 213 (3d Cir. 1967), the *Kauffman Court* added:

> While we adhere to this rule, we do not thereby intend to subvert the liberal policy favoring amendment of complaints as expressed in Rule 15(a). The considerations underlying the Negrich requirement must be balanced against the equally important policies that pro se litigants not be denied the opportunity to state a civil rights claim because of technicalities, and that litigation, where possible, should be decided on the merits." *Kauffman*, 420 F. 2d at 1276.

The *Kauffman Court* went on to state that pursuant to Rule 15(a): "[T]he district court is enjoined to "freely" permit amendment as a matter of discretion." *Kauffman*, 420 F. 2d at 1276 (quotation marks in the original).

The Court went on to order that:

> [T]he judgment with respect to the remaining appellees be vacated and leave granted to amend within such reasonable period after vacation of the judgment as may be fixed by

the court. *Kauffman*, 420 F.2d at 1276.

The District Court also erred in citing *Pulliam v. Allen*, 466 U.S. 522, (1984), for the notion that when considering whether to enjoin the action of a state judicial officer pursuant to section 1983 action that the question is one of federal-state relations, or, comity.

The propriety of abstaining in civil-rights cases has been the subject of conflicting statements. In *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), Mr. Justice Powell observed on behalf of the majority that there is substantial authority for the proposition that abstention is not favored in an equal protection, civil rights case brought under 42 U.S.C. § 1983. 415 U.S. at 628. Expanding upon this observation, a number of lower courts have stated that they are particularly hesitant or at least reluctant to abstain in section 1983 actions, *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Moe v. Dinkins*, 635 F.2d 1045 (2d Cir. 1980); *Manny v. Cabell, 654* F.2d 1280 (9th Cir. 1980), Cert. Denied, 102 S.Ct. 1630 (1982); *Tepper v. Galloway*, 481 F.Supp. 1211 (E.D.N.Y. 1979); that the decision to abstain in such cases requires special care, *Stearns v. Estes*, 504 F.Supp. 998 (C.D. Cal 1980); that civil rights actions are the least likely candidates for abstention, *Canton v. Spokane School District No. 81*, 498 F.2d 840 (9th Cir. 1974); *Stephens v. Tielsch*, 502 F.2d 1360 (9Cir. 1974); *George v. Parratt*, 602 F.2d 818 (8th Cir. 1979); and that abstention in civil rights cases is not favored and is not to be encouraged. *Drexler v. Southwest Dubois School Corp.*, 504 F.2d 836 (7th Cir. 1974) (en banc).

Abstention is a discretionary doctrine, requiring

the presence of essential conditions and is always narrowly applied. Federal courts quite rightly have paid close attention to the particular constitutional right involved as well as to whether that right would be irreparably injured as a result of the delay occasioned by abstention.

The District Court failed to look beyond the status of the judicial and prosecutorial respondents, and examine whether in their alleged conduct the respondents agreed in advance to rule in favor of respondent Charles P. Medico.

Regarding comity and federalism, it is axiomatic that if official immunity does not apply regarding corrupt conduct, comity should not be made available to extend clemency to state officials for alleged state court corruption. While the principle of comity may be a source of judicial policy, it is emphatically no source of judicial power to renounce jurisdiction.

The application of the comity principle has thus been limited to a relatively narrow class of cases: Only where a federal court is asked to employ its historic powers as a court of equity, and is called upon to decide whether to exercise the broadest and potentially most intrusive form of judicial authority, does "comity" have an established and substantial role in informing the exercise of the court's discretion.

There is little room for the "principle of comity" in actions at law where, apart from matters of administration, judicial discretion is at a minimum. Surely no judicial power to fashion novel doctrine concerning the jurisdiction of the federal courts is to be found in the

Constitution itself. The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to the District Court. In its haste to dismiss the petitioner's complaint, the District Court departed from this fundamental precept.

Some of the respondents, seeking to defeat the Civil Rights Act, argued that the District Court could have dismissed this case on the grounds of Abstention and the *Rooker-Feldman Doctrine*, [*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923)], which prohibits federal court review of state court decisions. The respondents' reliance on Abstention and on the *Rooker-Feldman Doctrine* is misplaced, where the respondents do not understand the essence of Abstention; and that the *Rooker-Feldman Doctrine* does not apply in this case.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court answered a number of questions vital to the operation of section 1983. In *Monroe*, this Court laid down the general rule that state judicial or administrative remedies never had to be exhausted before maintaining a section 1983 action. This Court stated that *Monroe v. Pape* stood for the proposition that:

> [R]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Monroe*, 365 U.S. at 671.

This Court likewise dismissed the applicability of the abstention doctrine with the observation:

> [I]n the present case no underlying issue of state law [controls] this litigation. The right alleged is ... plainly federal in origin and nature. ... Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. ... Such claims are entitled to be adjudicated in the federal courts." *Monroe*, 365 U.S. at 674.

After a discussion of the congressional debates, the Court reiterated:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Monroe*, 365 U.S. at 180.

Given this objective, the Court, speaking through Mr. Justice Douglas, held that the availability of a state remedy was irrelevant. In extremely general language not limited to the context of exhaustion of state judicial remedies, the Court stated:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. *Monroe*, 365 U.S. at 183.

In other words, in *Medico,* there is no state judicial exhaustion requirement. *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 555 (6th Cir. 1983), aff'd, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

Next, some of the judicial respondents argued that, "[g]iven the inherently ongoing nature of state court domestic relations proceedings, the lower court could have abstained from taking jurisdiction in this matter" citing, *inter alia*, *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1 (1987) and *Younger v. Harris*, 401 U.S. 37 (1971). The respondents missed the heart of *Younger* abstention which addresses a concern for "the rightful independence of state governments." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). *Younger* abstention contemplates not merely the postponement, but *foreclosure* of federal district court jurisdiction. When *Younger* compels abstention, access to a federal forum for vindication of federal rights will be available, if at all, only by way of Supreme Court review of the state proceedings.

None of the necessary requirements for *Younger* abstention exist in Medico: There is no underlying issue of state law which controls this litigation. The rights alleged are plainly federal in origin and nature; nor are the rights alleged in any way entangled in a skein of state law that must be untangled before the federal case can proceed.

Petitioner asserts that the respondents have been and are depriving her of rights protected by the Fourteenth Amendment. It is immaterial whether the respondents' conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts. *Monroe, supra,* 365 U.S. at 674.

Finally, pendency of a related action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976) (citations omitted). Nor does availability to a plaintiff of relief under state law work to justify, by itself, abstention by a federal court even if abstention in such a case would avoid the need to adjudicate a constitutional question. Federal courts have the power to enjoin unconstitutional state action even if such action is illegal under state law and hence remediable in state courts. *Home Telephone & Telegraph Co. v. City of Los Angeles,* 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913).

STAGE OF PROCEEDINGS AT WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

The petitioner timely raised the specific federal question regarding Rule 15 of the Federal Rules of Civil Procedure in her motion for reconsideration immediately upon the heels of the District Court's dispositive Order entered February 1, 1996.

AMPLIFICATION OF THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The petitioner does not seek review of state court decisions which have sometimes gone against her. Her federal claim is completely separate and distinct from the domestic relations issues pending in the state court below. This request for a writ of certiorari is a separate action for redress of violations of her right to due process and equal protection, fundamentally denied by Pennsylvania court officers who have repeatedly denied her the right to be heard in open court.

This Court is not asked to enmesh itself with domestic relations issues to fairly adjudicate the petitioner's federal claim. Final judicial review of the claim sought does not involve domestic relations issues, hence the federal domestic relations exception is not implicated.

The petitioner's request for a writ of certiorari has to do with fundamental, disparate, impermissible and unconscionable treatment at the hands of state court officials.

CONCLUSION

The petition for a writ of certiorari should be granted in order to address the issues presented, regarding successive amendment of pro se civil rights complaints. This issue is of extreme importance to civil rights litigants—particularly, women. If the Court of Appeals decision is accepted, many women will be deprived of due process and equal protection in state courts.

Respectfully submitted,

Carolee A. Medico

Petitioner in person

April 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7138

CAROLEE A. MEDICO,
Appellant

v.

CHARLES P. MEDICO; PATRICK J. TOOLE, JR.; DONALD D. DOLBIN; HUGH F. MUNDY, FIRST FIDELITY BANK, N.A., PENNSYLVANIA; ANTHONY TERRACIANO; LAWRENCE MACDONALD; Individually and as a court officer; THOMAS A. MAKOWSKI, Individually and as a court master of the Court of Common Pleas of Luzerne County, Pa.; SUZAN LATONA, Individually and as a Pennsylvania Standing Commissioner; CHESTER MUROSKI, Individually and as judge of the Court of Common Pleas of Luzerne County, Pa.; CORREALE STEVENS, Individually and as the district attorney of Luzerne County; DONALD O'MALLEY, Individually and as senior judge of the Court of Common Pleas of Luzerne County; CATHERINE DAVIS, Individually and as officer and agent of WB Postal Credit Union; SANDOR YELEN, Individually and as court master of the Court of Common Pleas of Luzerne County, Pa,: MAXINE WILLIAMS, Individually and as Pa. Standing Commissioner; EUGENE DUFFY, Individually and as Proth. of the Court of Common Pleas of Luzerne County; ROBERT E. COLVILLE; Individually and as special prosecutor; MICHAEL J. DIMARCO; Individually and as a court officer

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On Appeal from the United States District Court
for the Middle District of Pennsylvania

(D.C. Civ. No. 95-00834)
District Judge: Honorable Sylvia H. Rambo

Submitted under Third Circuit LAR 34.1(a)
December 26, 1996

BEFORE: GREENBERG, LEWIS, and MCKEE, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the order of the district court entered February 2, 1996, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

McKee, Circuit Judge

ATTEST:

/s/ P. Douglas Sisk, Clerk
DATED: FEB 6 1997

Cost Taxes In Favor of Appellees as follows:

Total for Brief	$123.05
Appellee, Kathryn Davis	
Total for Brief	173.40
Appellee, Judges	
Total for Brief	179.14
Appellee, Makowski, et. al.	
Total	$475.59

Certified as a true copy and issue in lie
of a formal mandate on February 28, 1997
Teste: /s/ P. Douglas Sisk
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CAROLEE A. MEDICO,	:	CIVIL ACTION NO.
	:	1:CV-95-0834
Plaintiff,	:	
v.	:	
	:	FILED
CHARLES P. MEDICO, et al	:	HARRISBURG, PA
	:	FEB 1 1996
Defendants.	:	MARY E. D'ANDREA
	:	CLERK

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) Defendant Maxine William's motion to dismiss is GRANTED;

2) The joint motion to dismiss of Defendant's First Fidelity Bank, N.A., Anthony Terracciano and Michael DiMarco is GRANTED;

3) Defendant Eugene Duffy's motion to dismiss is GRANTED;

4) Defendant Correale Steven's motion to dismiss is GRANTED;

5) The joint motion to dismiss of Defendants Charles Medico and Lawrence MacDonald is GRANTED;

6) The joint motion to dismiss of Defendants Thomas Makowski, Sandor Yelen and Suzan Latona is GRANTED:

7) The motion to dismiss of Defendant Kathryn Davis is GRANTED;

8) The motion to dismiss of Defendant Robert Coleville is GRANTED;

9) The joint motion to dismiss of Defendant Patrick Toole, Defendant Chester Muroski, Defendant Hugh Mundy, Defendant Donald Dolbin, and Defendant Donald O'Malley is GRANTED;

10) The foregoing motions to dismiss are granted with prejudice;

11) The Clerk of Court shall close the file.

/s/ Sylvia H. Rambo, Chief Judge
Middle District of Pennsylvania

Dated: February 1, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CAROLEE A. MEDICO,	:	CIVIL ACTION NO.
	:	1:CV-95-0834
Plaintiff,	:	
v.	:	
	:	FILED
CHARLES P. MEDICO, et al	:	HARRISBURG, PA
	:	FEB 1 1996
Defendants.	:	MARY E. D'ANDREA
	:	CLERK

MEMORANDUM

Presently before the court are more than a dozen motions to dismiss the amended complaint. The parties have briefed the issues and the motions are ripe for disposition. Arising from a divorce action in state court, the captioned action has mushroomed into a federal action alleging various RICO and civil right violations. Certain Defendants have filed motions to dismiss on their own behalf, while other Defendants have filed joint motions to dismiss. Most of the motions raise at least one legal issue common to one or more of the other pending motions. Accordingly, the court has framed it discussion by issue rather than by Defendant.

I. Background

The captioned action arises from ongoing domestic relations and mortgage foreclosure proceedings in the Court of Common Pleas for Luzerne County, Pennsylvania. Plaintiff alleges that the Defendants have conspired to deprive her of her civil and constitutional rights. Defendants include several Court of Common Pleas judges, local prosecutors, a bank, bank employee, and a court reporter, among others. On May 26, 1995, Plaintiff filed her complaint in the instant action.

Subsequently, on September 5, 1995, Plaintiff filed her amended complaint that is the focus of the pending motions.[1] Through the captioned action Plaintiff seeks injunctive relief and both punitive and compensatory damages.

II. Legal Standards: Motion to Dismiss

Under Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must " 'take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff,' and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)), cert. denied, 489 U.S. 1065 (1989). "Because 12(b)(6) results in a determination on the merits at an early state of plaintiff's case, the plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." Mortensen v. First Fed. Saving and Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977). In considering whether a complaint should be dismissed pursuant to Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

III. Discussion

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1. Some Defendants have raised an issue as to whether Plaintiff had leave of the court to file an amended complaint. On September 8, 1995, this court granted Plaintiff leave to file the amended complaint presently before the court. Medico v. Medico, No. 1:CV-95-0834 (M.D. Pa. Sept. 8, 1995) (Vanaskie, J.).

The court's reading of the complaint leads the court to believe that Plaintiff seeks to plead causes of action pursuant to 18 U.S.C. § 1964(c), 42 U.S.C. § 1983, and 42 U.S.C. § 1985. In addition, Plaintiff seeks damages pursuant to 42 U.S.C. § 1988. The court will first evaluate whether Plaintiff has stated valid causes of action pursuant to RICO, and pursuant to §§ 1983 and 1985.

A. Pleading a Civil RICO Claim

At points in her amended complaint, Plaintiff alludes to the existence of a cause of action pursuant to the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 961 to 1968 ("RICO"). (See, e.g., Amended Comp. at ¶ 10.) To properly plead a civil RICO claim, Plaintiff must plead all elements of the claim, including facts sufficient to establish the commission of predicate acts demonstrating a patter of racketeering activity. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, the pleading must be "simple, concise, and direct." Fed.R.Civ.P. 8(a)(2). Additionally, the pleading must conform with Rule 9(b) of the Federal Rules of Civil Procedure which provides as follows:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed.R.Civ.P. 9(b). For a variety of reasons Plaintiff has failed to properly plead a civil RICO claim.

First, Plaintiff has not characterized the predicate acts which formed the "pattern of racketeering activity," the crux of any RICO claim. Based upon the complaint, the court can infer that the predicate acts may have involved obstruction of justice,

mail fraud or wire fraud. However, even if the court made this inference with respect to predicate acts, Plaintiff's claim would still fail. In addition to failing to allege a "pattern of racketeering activity," Plaintiff has failed to allege that such activity was conducted by an "enterprise." Section 1962, which delineates the acts which are prohibited under RICO, provides the following descriptions of prohibited activities:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate commerce or foreign commerce.
>
> * * *
>
> (d) it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. Section 1964 provides civil remedies for the violation of any part of § 1962 insofar as "[a]ny person [is] injured in his business or property by reason of a violation of section 1962." 8 U.S.C. § 1964(c). Again, because there is no

there is no express mention in the amended complaint, the court must presume that Plaintiff's claim is brought pursuant to § 1964(c). While the Supreme Court in National Organization for Women, Inc. v. Scheidler, ___ U.S. ___, 114 S.Ct. 798 (1994), somewhat enlarged the scope of civil RICO actions by finding that the statute does not require proof of an "economic motive," the court firmly held that maintenance of a RICO action requires proof that the defendants "conducted the enterprise through a pattern of racketeering activity." Id. at 806 (emphasis added). It is here that Plaintiff's claim falters.

Even if the court were to loosely group all of the Defendants as an associates in fact enterprise, Plaintiff has not pleaded any facts in support of RICO's continuity requirement. United States v. Turkette, 452 U.S. 576 (1981) (finding that a RICO enterprise is "proved by evidence of an ongoing organization, formal or informal, an by evidence that the various associates function as a continuing unit."). Nothing before the court indicates that these individuals continuously associates as an enterprise for any specified period of time. Moreover, Plaintiff has failed to allege the requisite nexus with interstate commerce. 18 U.S.C. § 1962; see Rose v. Bartle, 871 F.2d 331, 357 (3d Cir. 1989) (nexus is alleged where the the plaintiff shows that enterprise had minimal engagement in or effect upon interstate commerce). Thus, even if the court continued with this exercise of inferring the majority of Plaintiff's claim, it is unable to infer that the enterprise or its activities had the requisite nexus with interstate commerce.

Accordingly, the court finds that insofar as Plaintiff has attempted to plead a civil RICO claim against any or all of the Defendants, that claim must fail. As the court cannot ascertain from the complaint which Defendants are implicated by the RICO claim, what the predicate acts were, what the enterprise was, and what the enterprise's nexus with interstate commerce was, the complaint clearly fails to comply with the strictures of Rules 8 and 9 of the Federal Rules of Civil Procedure.

Moreover, Plaintiff has failed to meet the most basic pleading requirement of a civil RICO action, that of pleading all elements of the claim. Consequently, the court will dismiss the RICO component of Plaintiff's complaint insofar as such a component exists or was intended to exist by Plaintiff. The court will now proceed with its analysis of Plaintiff's civil rights claims.

B. Pleading a Civil Rights Claim Pursuant to § 1983

In their motions to dismiss, Defendant Kathryn Davis, Robert Coleville, Maxine Williams,[2] the Fidelity Defendants,[3] Susan Latona, Charles Medico and Lawrence MacDonald argue that Plaintiff has failed to state a valid claim pursuant to 42 U.S.C. § 1983.

Section 1983, one section of the civil rights statute pursuant to which Plaintiff has brought her claims, provides as follows:

Every person who, under color of any statute,

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2. Defendant Williams also argues that to the extent the court finds Plaintiff's § 1983 claims to be valid, Defendant Williams is immune from liability. Plaintiff's averments with respect to Defendants Williams relate to testimony given by Defendant Williams during a civil proceeding. It is well settled that § 1983 does not authorize damages claims against private witnesses. Briscoe v. Lahue, 460 U.S. 325 (1983). Thus, insofar as the claims against Defendant Williams relate to testimony given as a witness in a civil case, Defendant Williams immune from liability. Pennsylvania courts have similarly recognized this immunity in the context of § 1985 actions. Williams v. Tansey, 610 F.Supp. 1083, 12085 (E.D. Pa. 1985).

3. The "Fidelity Defendants" are: First Fidelity Bank, N.A., Anthony Terraciano and Michael DiMarco.

> ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws shall be liable to the party injured . . . .

42 U.S.C. § 1983. To state a cause of action pursuant to § 1983, a plaintiff must demonstrate that: "(1) the conduct complained of was committed by a person [or persons] acting under color of state law, and (2) that such conduct deprived a person of rights, privileges and immunities secured by the Constitution." Goussis v. Kimball, 813 F.Supp. 352, 355 (E.D. Pa. 1993). Thus, because Plaintiff's claims allege the deprivation of her Fourteenth Amendment rights to due process and equal protection of the laws, and because the Fourteenth Amendment applies only to action by governmental entities, Plaintiff must show some for of "state action." Janicsko v. Pellman, 774 F.Supp. 331, 335 (M.D. Pa. 1991) (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966), aff'd, 970 F.2d 899 (3d Cir. 1992). "[T]he complained of action in a § 1983 case must be one that is 'fairly attributable to the state,' and not to some private action." Id. (quoting Lugar v. Edmonson Oil Co., 467 U.S. 922, 937 (1982)). The case law establishes, however, " '[p]rivate parties who corruptly conspire with a judge . . . are acting under color of state law within the meaning of § 1983,' regardless of the judge's own immunity to suit." Colombrito v. Kelly, 764 F.2d 122, 132 (2d Cir. 1985) (quoting Dennis v. Sparks, 449 U.S. 24, 29 (1980)); Safeguard Mutual Ins. Co. v. Miller, 477 F.Supp. 299, 303 n.2 (E.D. Pa. 1979) (state action requirement is met where private party conspires with state officials who were acting under color of state law).

Plaintiff in the instant action alleges that a variety of private actors conspired with a number of state court judges to

deprive her of constitutionally protected rights. Thus, the court finds the pertinent inquiry to be whether Plaintiff has alleged facts which support her contention that she has been deprived of protected Fourteenth Amendment rights through the concerted action of "state actors."

Plaintiff has failed to state a cognizable § 1983 claim against any of the Defendants. The complaint neither makes the requisite state action showing, nor alleges that Plaintiff has been deprived of a protected Fourteenth Amendment right. Plaintiff argues that because private actors (e.g. the Fidelity Defendants) conspired with state actors (e.g. the Judicial Defendants), any action by any member of that conspiracy can be construed as state action. Had Plaintiff pleaded specific facts which supported her conspiracy theory, her assumption regarding state action might be correct. See Safeguard Mutual, 477 F.Supp. at 303 n.3. Plaintiff, however, has failed to plead such facts. The amended complaint apprises neither the court nor the Defendants of the mechanics of the alleged conspiracy. There is no indication that this rather diverse group of Defendants ever met and agreed to conspire to achieve any unlawful purpose. More basically, no facts are pleaded which demonstrate any interaction between any of the Defendants in any capacity other than their lawful official or professional capacities. Additionally, Plaintiff has not alleged that she has been deprived of any protected right. A mortgage foreclosure action is pending in state court. Thus, at present, Plaintiff is merely threatened with the possible deprivation of marital property. Moreover, through the pending state court actions, Plaintiff's procedural due process rights are being protected.

Based upon the foregoing, the court will grant the motions to dismiss of Defendants Davis, Coleville, Williams, Latona, Medico, MacDonald and the Fidelity Defendants with respect to this issue.

C. Pleading a Civil Rights Claim Pursuant to § 1985

In their motions to dismiss, Defendants Kathryn Davis, Robert Coleville, the Fidelity Defendants, Susan Latona, Charles Medico, Lawrence MacDonald and Eugene Duffy contend that Plaintiff has failed to state a valid claim pursuant to § 1985.

Section 1985, inter alia, provides a civil remedy for persons deprived of a constitutionally protected right where such right was deprived through the action of a conspiracy motivated by a class or race-based animus. "The language [of § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). To state a claim for conspiracy, the complaint must identify the specific conduct that violated Plaintiff's rights, the time and place of that conduct, and the identity of the responsible officials. Figueroa v. Clark, 810 F. Supp. 613, 616 n.3 (E.D. Pa. 1992). The Plaintiff must also allege facts which show an agreement amongst the defendants and facts which allege the specific participation of each defendant. Schmidt v. Borough of Stroudsburg, 841 F. Supp. 6390 (M.D. 1993). The United States District Court for the Eastern District of Pennsylvania has defined the elements of a § 1985(3) claim as follows:

> 1) a conspiracy by the defendants; 2) designed to deprive plaintiff of the equal protection of the laws; 3) the commission of an overt act in furtherance of that conspiracy; 4) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and 5) defendant's actions were motivated by a racial or otherwise class-based invidiously discriminatory animus.

Bieros v. Nicola, 851 F.Supp. 683, 686 (E.D. Pa. 1994). Even construing the amended complaint most liberally in favor of Plaintiff, the complaint fails to allege facts which support all element of a § 1985(3) claim.

As the court has already explained, Plaintiff's lengthy amended complaint fails to allege any of the necessary specifics with respect tot he alleged conspiracy. Further, and of more importance, Plaintiff has not pleaded any facts which support her contention that she is the victim of invidious class-based discrimination. Plaintiff alleges that she is a member of the class of women with powerful male spouses who are sued for divorce in Lackawanna County Pennsylvania. Additionally, Plaintiff appears to assert that the Court of Common Pleas judges and other named Defendants regularly conspire to deprive this class of women their constitutional rights in the context of routine domestic proceedings.

In Bray v. Alexandria Women's Health Clinic, ___ U.S. ___, 113 S.Ct. 753, 764 (1993), the Supreme Court, although declining to reach the merits of the issue, id. at 759 ("[w]e find it unnecessary to decide whether [the class of women in general] is a qualifying class under § 1985(3)"), discussed in dicta the broad standards for bringing a case pursuant to § 1985(3) and alleging the source of injury to be gender-based discriminatory animus. Specifically, the Supreme Court noted that " '[d]iscriminatory purpose' . . . implies more than as volition or intent as awareness of consequence. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 759. Plaintiff has not alleged facts in the complaint which support her contention that she is a member of a identifiable group has been subjected to purpose class-based discriminatory animus.

The court will grant the motions to dismiss of Defendants Davis, Coleville, Latona, Medico, MacDonald,

Duffy and the Fidelity Defendants with respect to Plaintiff's § 1985 claims as Plaintiff has failed to state claims upon which relief can be granted. As such, Plaintiff's claims for damages and attorney's fees pursuant to § 1986 and § 1988 are necessarily moot. The court will dismiss those counts of the complaint as moot.

C. Prosecutorial and Judicial Immunity

Many of the Defendants in the instant action are local judges and prosecutors. Although the court will dismiss Plaintiff's RICO and civil rights claims for failing to state cognizable causes of action, the court noes that insofar as these claims are lodged against judges and prosecutors, those Defendants were nonetheless immune from suit.[4] The Judicial Defendants are the Honorable Patrick J. Toole, the Honorable Hugh F. Mundy, and the Honorable Chester Muroski, all of the Court of Common Pleas for Luzerne County, Pennsylvania; the Honorable Donald D. Dolbin, Senior Judge of the Court of Common Pleas for Schuylkill County, Pennsylvania; and, the Honorable Donald O'Malley, Senior Judge of the Court of Common Pleas of Susquehanna County, Pennsylvania. Although they filed a separate motion, Defendants Thomas Makowski and Sandor Yelen, court appointed judicial officers for the Court of Common Pleas of Luzerne County, fall within the category of "Judicial Defendants" for the purposes of this discussion.[5] The "Prosecutorial Defendants" are the Honorable Robert Coleville, District Attorney for Allegheny County, Pennsylvania; and the Honorable Correale Stevens, formerly the

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4. The Judicial Defendants did not raise the Rule 12(b)(6) issue in their motion. Instead, their motion was predicated upon the doctrines of judicial immunity and abstention.

5. See Schapiro v. Montgomery County Court, No. 95-0986, 1995 U.S. Dist. LEXIS 7910 AT **7-8 (E.D. Pa. June 8, 1995) (affording special master in divorce proceeding judicial immunity for actions taken as special master).

District Attorney for Luzerne County, Pennsylvania, and presently a Court of Common Pleas Judge.

"As early as 1872, the [Supreme] Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' " Stump v. Sparkman, 435 U.S. 349, 355 (1977) (quoting Bradley v. Fisher, 13 Wall. 335, 347 (1872)). In 1967, the Court found the doctrine of judicial immunity to be applicable in cases brought pursuant to 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547 (1967). Discussing the scope of the doctrine of judicial immunity, the Court has noted the following:

> Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .", the scope of the judge's discretion must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

Stump, 435 U.S. at 356-57 (citations omitted). More specifically, "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." Id. at 359. To determine whether a judge is entitled to immunity, this court must apply a two part test. John v. Barron, 897 F.2d 1387, 1391 (7th Cir. 1990). First, the court must ask whether the acts in question were within the judge's jurisdiction; and second, the

court must determine whether the acts were performed within the judge's judicial capacity. Id.

It is equally well settled that prosecutors are immune from liability arising from their actions in initiating and presenting a criminal prosecution. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). Moreover, the decision to approve or disapprove a private criminal complaint may be characterized as "initiating a prosecution" as that phrase is defined in Imbler. Iseley v. Bucks County, 549 F.Supp. 160, 166 (E.D. Pa. 1982). "Just as the prosecutor who initiates a criminal case requires protection from the defendant who transforms his resentment into a lawsuit . . . so too the prosecutor who decides not to initiate a case requires protection from the complainant who may be blind to factors which militate against initiating prosecution. Id. In

In her complaint, Plaintiff alleges the following, inter alia, with respect to the Judicial Defendants:

> 28. The Defendants conspired to obstruct and impede, delay and set aside the due course of justice concerning matters and legal actions filed in the Court of Common Pleas of Luzerne County, Pennsylvania, at Term and Number 5862 Civil of 1993 . . . Terms and Numbers [sic] 2637 Civil of 1983 . . .; and Term and Number 129 Equity of 1994 . . . .

(Amend. Comp. at ¶ 28.) Plaintiff further argues that Defendants accomplished their ends by depriving her of her right to due process and equal protection of the law through the misuse of their judicial offices. (See, e.g., Amend. Comp. at ¶ 28(a) through ¶ 28(g), ¶ 57, ¶ 58(2), ¶ 58(5), ¶ 58(7), ¶ 58(11), ¶ ¶ 61-66, ¶ 73.) Finally, Plaintiff contends that a secondary object of the conspiracy was to "deprive Plaintiff of her entire

right, title and interest in her marital estate and in her real property, and to reduce her to penury." (Amend. Compl. at ¶ 29.)

Plaintiff, in her brief in opposition to the Judicial Defendants' motion to dismiss, argues that the Judicial Defendants effectively "acted without jurisdiction or authority . . . . acted outside the scope of . . . official duties, and . . . impermissibly entered an official court order." (Pl.'s Brief in Opp. at 2.) Plaintiff has missed the essence of the absolute immunity doctrine. It is clear even from Plaintiff's description that the actions taken by the Judicial Defendants were judicial actions, and thus, were subject to the immunity doctrine. Taking the averments in the amended complaint as true, as it must, the court finds the alleged conduct of the Judicial Defendants troubling. However, each of the judges had jurisdiction over the matters which they heard or acted upon. Further, the actions taken were clearly taken within the scope of the judge's respective judicial capacities as the actions involved assigning cases, setting hearing dates, conducting hearings, and the like. It is of no matter in this inquiry that the judges are alleged to have acted with malice or outside the scope of their authority. See Stump, 435 U.S. at 356-57. Accordingly, the Judicial Defendants are protected by the doctrine of absolute immunity.

As to the Prosecutorial Defendants, Plaintiff contends that Defendant Coleville's failure to investigate or prosecute Defendants Medico and MacDonald regarding corruption of the judicial process evidences his participation in the conspiracy to deny Plaintiff her constitutional rights. The court gathers that Plaintiff provided Defendant Coleville with information which she believed demonstrated criminal wrongdoing in connection with ongoing domestic relations and mortgage foreclosure proceedings in which she was involved. Further, it appears that Defendant Coleville, using his discretion as a prosecutor, elected not to act on the information. The issue is whether Defendant

Coleville's decision not to prosecute falls within the scope of activities for which he is immune from liability as a prosecutor.

The allegations made in the complaint pertain solely to functions performed by Defendant Coleville in the context of initiating (or choosing not to initiate) a criminal prosecution. Defendant Coleville thus enjoys absolute immunity from suit arising from these actions. Similarly, insofar as the averments in the amended complaint pertain to actions taken by Defendant Stevens in the area of initiating or bringing a criminal action while he was District Attorney, Defendant Stevens is immune from liability.

Based upon the foregoing, the court will grant the motions to dismiss of the Judicial Defendants, Defendant Yelen, Defendant Latona, Defendant Coleville and Defendant Stevens.

IV. Conclusion

Based upon the foregoing, the court will grant all motions to dismiss the amended complaint in their entirety. The court finds that Plaintiff has failed to state cognizable claims pursuant to 18 U.S.C. § 1964(c), 42 U.S.C. § 1983 or 42 U.S.C. § 1985. As such, Plaintiff's claims pursuant to 42 U.S.C. § 1986 and 42 U.S.C. § 1988 are moot. Find that Plaintiff has failed to state a claim upon which relief can be granted, the court will not reach the merits of the statute of limitations and abstention arguments raised by some Defendants.

An appropriate order will be issued.

/s/ Sylvia H. Rambo, Chief Judge
Middle District of Pennsylvania

Dated: February 1, 1996.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CAROLEE A. MEDICO,	:	CIVIL ACTION NO.
	:	1:CV-95-0834
Plaintiff,	:	
v.	:	
	:	FILED
CHARLES P. MEDICO, et al	:	HARRISBURG, PA
	:	APR 10 1996
Defendants.	:	MARY E. D'ANDREA
	:	CLERK

MEMORANDUM & ORDER

Before the court is Plaintiff's motion for reconsideration of this court's order dated February 1, 1996. Through that order this court dismissed the captioned action. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (citation omitted), cert. denied, 476 U.S. 1171 (1986). Therefore, a court may properly grant a party's motion for reconsideration in any of the following circumstances: "(1) the development of an intervening change in the law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or prevent a manifest injustice." Cohen v. Austin, 869 F.Supp. 320, 321 (E.D. Pa. 1994).

The majority of the Plaintiff's motion for reconsideration and supporting brief merely restates the arguments raised in opposition to the motions to dismiss. Two issues raised in the motion for reconsideration merit a brief discussion. First, Plaintiff contends that it was erroneous for this court to dismiss her civil rights complaint in that she is

therefore, should have been given the opportunity to amend her complaint. Plaintiff fails to note that the court has permitted her to amend her complaint, and that the court was, in fact, ruling on the amended complaint. Second, Plaintiff argues that the doctrine of judicial immunity does not apply in the context of a request for injunctive relief pursuant to 42 U.S.C. § 1983. Plaintiff's general statement of the law is correct. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). As it relates to this action, however, Plaintiff's argument is without merit. The court dismissed Plaintiff's civil rights claims for failure to state a claim upon which relief could be granted. Medico v. Medico, No. 3:CV-95-0834, Mem. Op. at 7-13 (M.D. Pa. February 1, 1996). Nevertheless, even if the court had rested its decision on the judicial immunity issue, Plaintiff's argument would still fail. The Supreme Court has noted that when considering whether to enjoin the action of a state judicial officer pursuant to § 1983 the question is one of federal-state relations. Pulliam, 466 U.S. at 539. Moreover, the Court reaffirmed "the need for restraint by federal courts called on to enjoin" such state judicial action. Id. While the court finds that it is unnecessary to reach the merits of Plaintiff's argument as her claim was dismissed on other grounds, the court notes that principles of comity and federalism would likely weigh heavily in favor of this court refraining from enjoining a state court proceeding. The court finds that Plaintiff's motion for reconsideration fails to demonstrate any clear error of law or need to prevent manifest injustice. Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration is DENIED.

/s/ Sylvia H. Rambo, Chief Judge
Middle District of Pennsylvania

Dated: April 10, 1996.

No. 96-1750

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

CAROLEE A. MEDICO,

Petitioner,

vs.

CHARLES P. MEDICO, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THOMAS A. MAKOWSKI, ESQ., SANDOR YELEN, ESQ., SUZAN LATONA, EUGENE DUFFY AND THE HONORABLE ROBERT E. COLVILLE

GEORGE A. REIHNER
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ELLIOTT REIHNER SIEDZIKOWSKI & EGAN, P.C.
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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's claims were properly dismissed with prejudice where Petitioner initially filed a Complaint, then filed an amended complaint, and was instructed on how to file a motion seeking leave to file a second amended complaint but failed to do so before the district court dismissed the action, particularly where such amendment would be futile?

2. Whether court-appointed masters in Petitioner's divorce and support proceedings in state court and a special prosecutor appointed to review Petitioner's allegations of wrongdoing are entitled to the protection of absolute immunity from Petitioner's claims?

3. Whether Petitioner's allegations of civil rights violations due to animus against her individually and/or against the spouses of prominent men in Luzerne County, Pennsylvania failed to state a claim upon which relief may be granted?

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6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1489 (1990) 7

I

STATUTES INVOLVED

In addition to Federal Rules of Civil Procedure 15(a), 59(e) and 60, the following statutes are involved in this case:

> **§ 1983 Civil Action For Deprivation Of Rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

> **(3) Depriving Persons Of Rights Or Privileges.** If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all

> persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

STATEMENT OF THE CASE

A. Procedural Background

On May 26, 1995, Petitioner Carolee A. Medico ("Petitioner") filed her original complaint against six (6) defendants. Thereafter, on September 5, 1995, Petitioner filed an amended complaint against eighteen (18) persons, including Respondents Thomas A. Makowski, Esq., Sandor Yelen, Esq.,

Suzan Latona, Eugene Duffy, the Prothonotary of Luzerne County, Pennsylvania, and the Honorable Robert E. Colville, the District Attorney of Allegheny County, Pennsylvania. All Respondents filed motions to dismiss Petitioner's amended complaint. Petitioner indicated that she was considering filing a second amended complaint and, as Petitioner concedes, during a November 29, 1995 case management conference, the district court instructed Petitioner on the appropriate procedure for filing a motion for leave to amend her amended complaint. *See* Petitioner's Brief at pp. 5, 8.

More than two (2) months after the November 29, 1995 conference, by Order and Opinion dated February 1, 1996, the district court (Rambo, C.J.) granted the motions to dismiss and ordered that the action be dismissed with prejudice. Petitioners' Appendix 3a-19a. By Order and Opinion dated April 10, 1996, the district court denied Petitioner's motion for reconsideration. *Id.* at 20a-21a. Thereafter, Petitioner filed an appeal to the United States Court of Appeals for the Third Circuit and, on February 6, 1997, a judgment order affirming the district court was entered by the Third Circuit. *Id.* at 1a-2a.

B. Factual Background

Petitioner averred in her amended complaint that Respondents Thomas Makowski, Esq. and Sandor Yelen, Esq., duly appointed masters in her divorce and support proceedings, had allegedly engaged in wrongful conduct in their capacities as court-appointed masters in 1983. *See* Amended Complaint ¶¶ 6, 37, 43, 58(3), 58(9). Petitioner further averred that Respondent Suzan Latona had improperly performed services as a court reporter in Petitioner's divorce proceedings in 1983. *See* Amended Complaint ¶¶ 7, 38, 58(4). In addition, Petitioner alleged that Respondent Eugene Duffy, in his capacity as the Prothonotary of Luzerne County, had wrongfully failed to accept

certain papers of Petitioner for filing in her divorce and support proceedings. *See* Amended Complaint ¶ 58(12). Finally, Petitioner objected to Respondent District Attorney Colville's decision, made in his capacity as a specially appointed prosecutor, not to initiate criminal proceedings against certain persons who had allegedly engaged in criminal misconduct against Petitioner. *See* Amended Complaint ¶¶ 5, 58(13).

Petitioner alleged that the eighteen (18) defendants named in her amended complaint had violated her substantive due process rights under 42 U.S.C. § 1983 and conspired to deprive her of her constitutional rights in violation of 42 U.S.C. § 1985. The instant Respondents filed motions to dismiss Petitioner's amended complaint, asserting, *inter alia*, that Petitioner's claims were barred by the doctrine of absolute immunity, that Petitioner failed to state a claim upon which relief could be granted under 42 U.S.C. § 1985, that Petitioner's claims were barred by the applicable statute of limitations, and that the district court should abstain from hearing this matter.

The district court granted all Respondents' Motions to Dismiss, ruling, *inter alia*, that Petitioner failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983, Petitioner's claims against certain Respondents were barred because Respondents were immune from suit, and that Petitioner had not alleged class-based animus so as to state a claim under 42 U.S.C. § 1985. As noted, the Third Circuit Court of Appeals affirmed the district court by a judgment order dated February 6, 1997.

SUMMARY OF ARGUMENT

Petitioner concedes that the Honorable Sylvia H. Rambo, Chief Judge of the United States District Court for the Middle District of Pennsylvania, explained to Petitioner the procedure which she was expected to follow to seek leave of court to further

amend her pleadings. *See* Petitioner's Brief at p. 8. Despite knowledge of the proper procedure and knowledge of the underlying facts and circumstances surrounding her alleged claims, Petitioner failed to seek leave of court during the more than two (2) month period prior to the district court's February 1, 1996 ruling. Because Petitioner failed to seek leave of court to amend her amended complaint prior to its dismissal with prejudice, Petitioner was required to comply with the requirements of Rule 59(e) and/or Rule 60 of the Federal Rules of Civil Procedure to obtain relief.

Petitioner seeks to hold certain public officials and lay persons who were involved in her divorce and support proceedings financially responsible for alleged violations of her civil rights pursuant to 42 U.S.C. § 1983 and § 1985. Petitioner did not, however, seek injunctive relief against Respondents Thomas A. Makowski, Esq., Sandor Yelen, Esq., Suzan Latona, Eugene Duffy, or the Honorable Robert E. Colville. Therefore, the district court properly dismissed Petitioner's amended complaint against them with prejudice, finding that court-appointed masters such as Respondents Makowski and Yelen were entitled to absolute immunity as was District Attorney Colville who, as a specially appointed prosecutor, declined to bring criminal charges based upon Petitioner's claims.

In addition, the district court properly found that Petitioner failed to plead any facts to support her contention that she was the victim of invidious class-based discrimination where Petitioner's allegations demonstrated that, at most, she is a member of a class of women with powerful male spouses who sued for divorce in Luzerne County, Pennsylvania. *See* Petitioner's Appendix 14a. This "class" of persons has never been recognized as the subject of invidious class-based discrimination, therefore, the district court properly rejected Petitioner's claims.

In light of the foregoing, this Court must reject Petitioner's petition for a writ of certiorari. The decisions of the courts below were in accordance with applicable law and Petitioner raises no question of law that justifies the granting of her Petition.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S POST-JUDGMENT REQUEST SEEKING LEAVE TO FILE ANOTHER AMENDED COMPLAINT WAS PROPERLY REJECTED.

The district court entered an Order on November 29, 1995 which required Petitioner to file an appropriate motion seeking leave to file another amended complaint, if she chose to do so. *See* Petitioner's Brief at pp. 5, 8. Despite that Order, Petitioner did not seek leave to file another amended complaint until *after* the district court issued its February 1, 1996 Opinion and Order dismissing Petitioner's amended complaint, however, Petitioner failed to include a proposed amendment. Moreover, Petitioner did not seek to vacate or set aside the judgment pursuant to Rule 59(a) or Rule 60 of the Federal Rules of Civil Procedure before seeking leave to amend her pleadings. A leading commentator has explained:

> once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion is made after that ten day period has expired, it must be made under the provisions of Rule 60(b) for relief from a judgment or order. This approach appears sound. To hold

> otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. Furthermore, the draftsmen of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless.

6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1489 at pp. 692-694 (1990) (citations omitted). *See Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 389 (1st Cir.), *cert. denied*, 513 U.S. 1015, 115 S. Ct. 574, 130 L. Ed. 2d 490 (1994) (after a complaint is dismissed, "[u]nless post-judgment relief is granted, the district court lacks power to grant a motion to amend the complaint under Rule 15(a)"). *See also First Nat'l Bank v. Continental Illinois Nat'l Bank & Trust Co.*, 933 F.2d 466, 468 (7th Cir. 1991) ("the presumption in favor of liberality in granting motions to amend, Fed. R. Civ. P. 15(a), is reversed after judgment has been entered").

Petitioner possesses no legally cognizable grounds under Rule 59(e) or Rule 60 to obtain relief from the judgment entered against her. Petitioner concedes that she does not intend to introduce any new legal theory to support her claims yet fails to attempt to articulate how she can overcome the legal deficiencies of her action. *See* Petitioner's Brief at p. 7. Petitioner further concedes that no discovery occurred in this action, thus Petitioner has been in possession of all facts supporting her allegations of misconduct by Respondents yet she neglected to include them in her complaint and in her amended complaint. A

motion for leave to amend a complaint is properly denied where a plaintiff has knowledge of the underlying issues yet failed to assert them. *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148-49 (4th Cir. 1988); *National Distillers & Chem. Corp. v. Brad's Mach. Prods., Inc.*, 666 F.2d 492, 495 (11th Cir. 1982). Moreover, where a party is in possession of the underlying facts and legal theories but chooses not to assert them until after judgment is entered, Rule 15(a) should not be used to afford the party an avenue to escape the consequences of its earlier litigation decisions. *Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 974 F.2d 502, 506 (4th Cir. 1992). In the present case, Petitioner had ample opportunity to seek permission from the district court to amend her amended complaint but failed to do so until after judgment had been entered. In such circumstances, the district court properly denied Petitioner's post-judgment request. *See Jeffries v. Deloitte Touche Tohmatsu Int'l*, 164 F.R.D. 34, 36 (E.D. Pa. 1995). Petitioner has failed to aver any proper grounds under Rule 59 or Rule 60 to alter or amend the judgment or to otherwise obtain relief from the judgment.[1]

II.

THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S AMENDED COMPLAINT AGAINST RESPONDENTS MAKOWSKI, YELEN AND COLVILLE DUE TO THE DOCTRINE OF ABSOLUTE IMMUNITY.

Respondents Thomas A. Makowski, Esq. and Sandor Yelen, Esq., who served as court-appointed masters, were entitled to

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1. Moreover, as discussed more fully below, due to the absolute immunity of some Respondents, the lack of any legally sufficient averments of discriminatory conduct, and the application of the statute of limitations, any amendment as to the instant Respondents would be futile and would properly be rejected by the district court. *See Gasoline Sales v. Aero Oil Co.*, 39 F.3d 70, 74 (3d Cir. 1994); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993).

absolute quasi-judicial immunity. In addition, the Honorable Robert E. Colville, the District Attorney of Allegheny County who had been appointed as a special prosecutor in connection with Petitioner's claims, was entitled to absolute immunity for his decision not to pursue Petitioner's allegations.

A. As Court-Appointed Masters In Petitioner's Divorce Proceedings, Respondents Makowski And Yelen Are Entitled To Absolute Immunity.

The district court properly dismissed Petitioner's claims against Respondents Makowski and Yelen because Petitioner averred that Respondents "Makowski and Yelen are attorneys, and at all times pertinent hereto were officers of the Court of Common Pleas of Luzerne County." Amended complaint at ¶ 6. More specifically, Petitioner averred that "[a]t all times pertinent hereto Defendant Makowski acted as official court master of Common Pleas Luzerne. [sic]". Amended Complaint at ¶ 37. Similarly, Petitioner averred that "[a]t all times pertinent hereto Defendant Yelen acted as official court master". Amended Complaint at ¶ 43. Petitioner did not seek injunctive or declaratory relief against any of the Respondents herein.

As this Court has held:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, should be free to act upon his own convictions without apprehension of personal consequences to himself. For that reason the

> Court held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle.

Stump v. Sparkman, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 55 L. Ed. 2d 331, 338-39 (1978). This Court indicated "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. More recently, this Court held that "our cases make clear that the [absolute judicial] immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for non-judicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9, 14 (1991) (citations omitted). The relevant inquiry is the nature and function of the act, not the act itself; therefore, this Court must look to the particular act's relation to a general function normally performed by a judge. *See Mireles*, 502 U.S. at 13.

As court-appointed judicial officers, Respondents Makowski and Yelen are entitled to absolute immunity from the claims set forth in Petitioner's amended complaint because judges and those acting in judicial capacities are absolutely free

from liability for damages for acts performed in their official capacities, whether under § 1983 or § 1985. *See Buchanan v. Buchanan*, No. 93-36051, 1994 U.S. App. LEXIS 34447, at *5 (9th Cir. Dec. 6, 1994); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). The doctrine of absolute judicial immunity extends to "masters" and other judicial officers in divorce or custody matters because their actions are taken in a judicial capacity, therefore, claims under §§ 1983, 1985, 1986 and 1988 are barred. *Humphrey v. Court of Common Pleas*, 640 F. Supp. 1239, 1242 n.2 (M.D. Pa. 1986); *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522, 527 (E.D. Pa. 1978); *Schapiro v. Montgomery County Court*, No. 95-0986, 1995 U.S. Dist. LEXIS 7910, at **7-8, (E.D. Pa. June 8, 1995), *aff'd*, 74 F.3d 1227 (3d Cir. 1995). *See also Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989) (a guardian *ad litem* is absolutely immune when acting as an integral part of the judicial process including, *inter alia*, "making reports or recommendations to the court in which the guardian acts as an actual functionary or arm of the court, not only in status but in reality"). Under Pennsylvania law, masters in divorce occupy quasi-judicial positions and have the status of judicial officers because masters derive their power from the court that appointed them. *Commonwealth v. Beddick*, 180 Pa. Super. 221, 119 A.2d 590, 592 (1956). *See* Pa. R. Civ. P. 1920.51.

"A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-57. *See Pierson v. Ray*, 386 U.S. 547, 554-55, 87 S. Ct. 1213, 1217-18, 18 L. Ed. 2d 288 (1967) (absolute immunity doctrine is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences). Significantly, the doctrine of judicial immunity

extends to immunity from suit, not just from the ultimate assessment of damages. *Mireles*, 502 U.S. at 11.

Petitioner's claims against Respondents Makowski and Yelen are for money damages and Petitioner admittedly does not seek injunctive relief against these two Respondents whose challenged conduct occurred in approximately 1983.[2] In addition, Petitioner's amended complaint reveals that Respondents Makowski and Yelen had jurisdiction over her divorce and support proceedings. Petitioner concedes that she appeared before Respondents Makowski and Yelen in their capacities as court-appointed masters in her divorce and support proceedings. Petitioner does not and cannot claim that Respondents Makowski and/or Yelen lacked jurisdiction to proceed as court-appointed masters in her divorce and support proceedings.

Assuming the truth of Petitioner's allegations, which the district court properly did in ruling upon the motions to dismiss, Petitioner's claims against these Respondents may be summarized as follows: (1) Respondents Makowski and/or Yelen, along with Respondents Latona and Williams, improperly altered, amended or destroyed various court transcripts from Petitioner's divorce proceeding; and (2) Respondents Makowski and/or Yelen delayed ruling upon various issues in Petitioner's divorce and support proceedings. The certification of transcripts and the use of transcripts in judicial proceedings are normal functions of a judge and/or court-appointed masters in divorce and support proceedings in Pennsylvania. *See, e.g.*, 23 Pa. C.S.

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2. Petitioner's discussion of *Pulliam v. Allen*, 466 U.S. 522 (1984) is inapplicable to Respondents herein because Petitioner never asserted claims for injunctive relief against them. Moreover, Petitioner's reliance upon *Monroe v. Pape*, 365 U.S. 167 (1961) fails to acknowledge that it was substantially overruled by *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

§ 3321 (regarding hearings by court-appointed masters in divorce proceedings); Pa. R. Civ. P. 1920.51(a)(1); Pa. R. Civ. P. 1920.53(a)(1), (b), (c). Allegations that a judicial officer caused transcripts to be altered must be dismissed due to absolute judicial immunity because such conduct constitutes "judicial acts". *See Eades v. Sterlinske*, 810 F.2d 723, 725-26 (7th Cir.), *cert. denied*, 484 U.S. 847, 108 S. Ct. 143, 98 L. Ed. 2d 99 (1987); *Green v. Maraio*, 722 F.2d 1013, 1018 (2d Cir. 1983). Because the nature and function of the alleged acts of Respondents Makowski and Yelen are of a general function normally performed by a judge or court-appointed master, Petitioner's claims were properly dismissed with prejudice. *See Mireles*, 502 U.S. at 12; *Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) (a judicial act does not become less judicial by virtue of an allegation of malice or corruption of motive). In light of these claims, Respondents Makowski and Yelen are entitled to absolute quasi-judicial immunity because their alleged conduct admittedly occurred when they had jurisdiction over Petitioner's divorce-related proceedings. Therefore, the district court properly dismissed Petitioner's amended complaint.

Petitioner's claims that Respondents Makowski and/or Yelen violated her civil rights due to their alleged delay in rendering a decision in her divorce and/or support proceedings must also be rejected:

> Deciding when to issue a decision is part and parcel in a judge's docket management function over which he has broad and virtually unfettered discretion. A judge may weigh a multitude of factors in deciding when to decide a case. The relative importance of the case among other pending cases, the prospects that another court will soon issue an important legal precedent, the difficulty

> of making a decision in the case, and the size and complexity of the case are only a few of the factors he must weigh. Moreover, the timing of the decision is normally, if not always, a judicial decision. . . . For these reasons we think that deciding when to decide a case, no less than deciding the case itself, is a judicial act for which a judge is absolutely immune. We therefore hold that [a judge's] delay in deciding the case, albeit inordinate, is cloaked with absolute judicial immunity.

Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985) (citations omitted).[3]

There are no claims against Respondents Makowski or Yelen which derive from allegations other than those based on alleged acts in their capacities as judicial officers. Moreover, Petitioner's amended complaint demonstrates that the Court of Common Pleas of Luzerne County, Pennsylvania and its duly-appointed masters properly had jurisdiction over Petitioner's divorce and support proceedings. Therefore, as a matter of law, Petitioner's amended complaint is barred by the doctrine of absolute immunity and her claims against Respondents Makowski and Yelen were properly dismissed with prejudice.

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3. Petitioner, who was represented by counsel at all times relevant to the divorce dispute, must concede the availability of appellate rights and remedies in divorce and support proceedings in Pennsylvania. Petitioner's apparent failure to properly and timely pursue her appellate rights cannot be used to justify abrogating well-settled legal principles regarding the absolute immunity of judges, court masters, prosecutors, and other public officials.

B. District Attorney Colville's Decision Not To Prosecute Certain Alleged Claims Is Entitled To Absolute Prosecutorial Immunity.

Petitioner's amended complaint demonstrates that Petitioner improperly seeks to impose civil liability against District Attorney Colville, who was appointed as a special prosecutor to investigate Petitioner's claims, for deciding not to institute criminal proceedings based on Petitioner's allegations of court corruption in Luzerne County and for failing or refusing to investigate and proceed against Respondents Charles P. Medico and Lawrence D. MacDonald, and their alleged agents and co-conspirators. *See* Amended Complaint ¶¶ 5, 58(13). Petitioner seeks to strip District Attorney Colville of his absolute immunity merely because he failed to prosecute Petitioner's fanciful allegations of wrongdoing.

In light of Petitioner's allegations, this Court must engage in a functional analysis of each alleged activity of which Petitioner complains. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 125 L. Ed. 2d 209, 223 (1993); *Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128, 143 (1976); *Giuffre v. Bissell*, 31 F.3d 1241, 1251 (3d Cir. 1994). "[T]he relevant inquiry is the nature and function of the act, not the act itself." *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992) (*citing Mireles*, 502 U.S. 9). As the *Kulwicki* court held:

> Prosecutors are subject to varying levels of official immunity. Absolute immunity attaches to all actions performed in a "quasi-judicial" role. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). This includes activity taken while

> in court, such as the presentation of evidence or legal arguments, as well as selected out-of-court behavior "intimately associated with the judicial phases" of litigation.

Kulwicki, 969 F.2d at 1463.

"The decision to initiate a prosecution is at the core of a prosecutor's judicial role." *Imbler*, 424 U.S. at 430-31, 96 S. Ct. at 994-96. *See Rose v. Bartle*, 871 F.2d 331, 343 (3d Cir. 1989); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1268 (8th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 179, 136 L. Ed. 2d 119 (1996). A prosecutor is absolutely immune when making this decision, even where he acts without a good faith belief that any wrongdoing has occurred. *See Kulwicki*, 969 F.2d at 1463-64; *Rose*, 871 F.2d at 347 n.12; *Joseph v. Patterson*, 795 F.2d 549, 557 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d 516 (1987). *See Buckley*, 509 U.S. at 273 ("acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled . . ."). Similarly, prosecutorial immunity extends to a prosecutor's decision *not* to initiate a civil or criminal complaint. *See Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991), *cert. denied*, 502 U.S. 1044, 112 S. Ct. 903, 116 L. Ed. 2d 804 (1992); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990); *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988); *Dohaish v. Tooley*, 670 F.2d 934, 938 (10th Cir.), *cert. denied*, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed. 2d 63 (1982); *Doyle v. Oklahoma Bar Ass'n*, 787 F. Supp. 189, 192 (W.D. Okla. 1992), *aff'd*, 998 F.2d 1559 (10th Cir. 1993). District Attorney Colville's decision not to initiate a prosecution in light of Petitioner's claims clearly constitutes an activity intimately associated with the judicial

phase of the criminal process, therefore absolute prosecutorial immunity protects that decision from scrutiny by a disgruntled, chronic litigant. *See Imbler*, 424 U.S. at 430; *Schrob v. Catterson*, 948 F.2d 1402, 1408 (3d Cir. 1991). As this Court has instructed:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust in the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

Imbler, 424 U.S. at 424-25.

Petitioner proffers no set of facts under which the doctrine of absolute prosecutorial immunity can be abrogated or found inapplicable. Indeed, Petitioner clearly and unequivocally seeks to hold District Attorney Colville financially responsible for his decision not to prosecute alleged wrongdoers who, in Petitioner's mind, caused harm to Petitioner. Clearly, allowing a litigant to sue a prosecutor for failing to initiate a prosecution would unfairly inhibit the discretion that should be afforded to prosecutors as they weigh the available evidence to determine if an action should be initiated. Public confidence would be eroded because prosecutors might be inclined to approve the prosecution of ill-founded claims because they fear reprisals from disgruntled complainants. For the foregoing reasons, the doctrine of absolute immunity must be invoked to bar claims such as those asserted by Petitioner in this matter.

III.

THE DISTRICT COURT PROPERLY FOUND THAT PETITIONER'S AMENDED COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The district court properly made its initial inquiry as to whether Petitioner had sufficiently alleged a violation of a constitutional right. *See Pro v. Donatucci*, 81 F.3d 1283, 1287 (3d Cir. 1996); *In re City of Philadelphia Litig.*, 49 F.3d 945, 961 (3d Cir. 1995). The district court correctly found that "Plaintiff has not alleged that she has been *deprived* of any protected right. A mortgage foreclosure action is pending in state court. Thus, at present, Plaintiff is merely threatened with the possible deprivation of marital property. Moreover, through the pending state court actions, Plaintiff's procedural due process rights are being protected." *See* Petitioner's Appendix at 12a (emphasis in original). This Court has analyzed claims asserting conspiracy in violation of § 1985(3) and has stated as follows:

> Our precedents establish that in order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, *inter alia*, (1) that some racial, *or perhaps otherwise class-based, invidiously discriminatory animus* lay behind the conspirators' action, and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment.

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68, 113 S. Ct. 753, 122 L. Ed. 2d 34, 45 (1993) (citations and footnotes omitted; emphasis added). In its recent pronouncement in *Bray*, this Court noted as follows:

> We have not yet had occasion to resolve the "perhaps"; only in *Griffin* [v. Brackenridge, 403 U.S. 88 (1971)] itself have we addressed and upheld a claim under § 1985(3), and that case involved race discrimination . . . Whatever may be the precise meaning of a "class" for purposes of *Griffin*'s speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the animus requirement to avoid. As Justice Blackmun has cogently put it, the class "cannot be defined simply as the group of victims of the tortious action."

Bray, 506 U.S. at 269 (citations omitted).

This Court has twice declined to decide whether gender constitutes a class for purposes of claims under § 1985(3). *See Bray*, 506 U.S. at 270-71; *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 835-37, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). In *Bray*, however, this Court emphasized that the animus requirement demands at least a purpose that focuses upon women *by reason of their sex*. *Bray*, 506 U.S. at 269-70. In the present case, Petitioner has failed to allege that any of the Respondents were motivated by gender-based animus.

Rather, Petitioner has alleged that Respondents were motivated by hostility against her individually or, alternatively, against women seeking divorces from wealthy and prominent men in Luzerne County. Despite Petitioner's protestations, economically disadvantaged women do not constitute a protected class for the purpose of a § 1985 claim. *See United Bhd. of Carpenters*, 463 U.S. at 837. ("we find no convincing support in the legislative history for the proposition that [§ 1985(3)] was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities"). Simply put, claims under § 1985(3) do not reach conspiracies motivated by economic or commercial animus. *United Bhd. of Carpenters*, 463 U.S. at 839.

Because Petitioner did not plead in her amended complaint that Respondents engaged in the conduct at issue as a result of gender-based animus, the district court properly dismissed Petitioner's amended complaint. Even if discrimination on the basis of gender is actionable under § 1985, Petitioner has not properly alleged that Respondents engaged in any conduct as the result of gender-based animus. Rather, Petitioner identified the class of persons who allegedly have suffered class-based animus as Luzerne County women with powerful male spouses who are engaged in divorce proceedings in that County. Petitioner failed to allege any other class-based animus on which she purports to assert any claims under § 1985. Contrary to this Court's pronouncement in *Bray*, Petitioner has not claimed that she suffered discriminatory conduct *because of her gender*. Therefore, Petitioner's amended complaint was properly dismissed as a matter of law.

IV.

PETITIONER'S AMENDED COMPLAINT AGAINST ALL OF THE RESPONDENTS IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

All § 1983 claims are subject to the applicable state statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 280, 105 S. Ct. 1938, 1949, 85 L. Ed. 2d 254, 275 (1985). Although this Court in *Wilson* only addressed the question of whether § 1983 claims are governed by the state statute of limitations for personal injury actions, the Third Circuit Court of Appeals has held that § 1985(3) claims are subject to the same limitations. *Bougher v. University of Pittsburgh*, 882 F.2d 74, 79 (3d Cir. 1989). Accordingly, Pennsylvania's two year statute of limitations for personal injury actions, 42 Pa. C.S.A. § 5524, applies to Petitioner's claims under § 1985(3), as well as those claims under § 1983. *Id.*

As set forth in the amended complaint, Petitioner's claims against Respondents Makowski and Latona arise only from their alleged conduct in connection with a support hearing conducted in Luzerne County in 1983. *See* Amended Complaint at ¶ 58(3), 58(4). Similarly, Petitioner's allegations against Respondent Yelen arise in connection with a master's hearing which he conducted in Luzerne County during Petitioner's divorce proceedings. *See* Amended Complaint ¶ 58(9). With respect to Respondent Eugene Duffy, Petitioner complains of conduct that allegedly occurred at some time during 1983 to 1990. All acts that the Respondents are alleged to have done against Petitioner were known by Petitioner more than two years before the amended complaint was filed in September, 1995. Moreover, Petitioner's amended complaint demonstrates that Petitioner can plead no set of facts to warrant the tolling of the statute of limitations on her claims against these Respondents.

CONCLUSION

For all or any of the foregoing reasons, Respondents Thomas A. Makowski, Esq., Sandor Yelen, Esq., Suzan Latona, Eugene Duffy, and the Honorable Robert E. Colville respectfully request this Court to reject Petitioner Carolee Medico's petition for a writ of certiorari. Petitioner has failed to establish any significant reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court, nor has Petitioner identified any conflict with applicable decisions of this Court or any other Court of Appeals on the same or similar issues present in this matter.

Respectfully submitted,

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No. 96-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAROLEE A. MEDICO,

Petitioner,

vs.

CHARLES P. MEDICO, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did not the United States Court of Appeals properly affirm the order of the United States District Court for the Middle District of Pennsylvania, which appropriately dismissed the petitioner's section 1983 civil rights action against defendant-respondent Maxine Williams since it failed to allege state action, deprivation of constitutionally protected rights and class based discrimination?

2. Was not the District Court under no obligation to grant petitioner leave to file a second amended complaint because petitioner never moved to do so, because of prejudice to the defendants and because an amended complaint would be in vain because of the applicable statute of limitations and immunity?

PARTIES TO THE PROCEEDING

The petitioner is plaintiff Carolee A. Medico. The respondents are responding defendant Maxine Williams and defendants Charles P. Medico, Lawrence D. MacDonald, Patrick J. Toole, Jr., Thomas A. Makowski, Susan Latona, Chester Muroski, Correale Stevens, Donald O'Malley, Kathryn Davis, Sandor Yelen, Hugh F. Mundy, Eugene Duffy, Anthony Terraciano, First Fidelity Bank, N.A., Pennsylvania, Robert E. Colville, Michael J. DiMarco and Donald D. Dolbin.

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No. 96-1750

IN THE

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OCTOBER TERM, 1996

CAROLEE A. MEDICO,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court pursuant to 28 U.S.C. §1254(1). The judgment order of the Court of Appeals was issued on February 6, 1997.

COUNTERSTATEMENT OF THE CASE

Plaintiff petitioner, acting *pro se*, filed a complaint on May 26, 1995. Thereafter, an amended complaint was filed on September 5, 1995. Plaintiff's amended complaint alleges violations of the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.), 18 U.S.C. §1961, et. sec., as well as Civil Rights violations pursuant to 42 U.S.C. §1983 and §1985.

Defendant respondent Maxine Williams [hereinafter known as "Williams"] was named for the first time in the amended complaint.

Plaintiff's federal court suit stems from a state court divorce proceeding. Plaintiff alleges that during the state divorce proceeding, which continues to this date. five state court judges; two divorce court masters; two district attorneys; a bank; two bank officials; two court reporters (including responding defendant Williams); two attorneys; and the Luzerne County Prothonotary conspired to deprive her of constitutionally protected rights. Defendant Williams acted as a court reporter before a court appointed master during a divorce proceeding which took place on November 16, 1989. Thereafter, Williams gave testimony regarding the November 16, 1989 proceeding.

Each of the defendants filed motions to dismiss the federal court action. By order and memorandum dated February 1, 1996, Judge Rambo granted the various motions to dismiss. Thereafter, plaintiff sought reconsideration. By order and memorandum dated April 10, 1996, the motion for reconsideration was denied. Plaintiff's appeal to the Court of Appeals, followed.

The Court of Appeals affirmed the judgment of the District Court by Judgment Order of February 6, 1997.

Plaintiff now petitions this Honorable Court for writ of certiorari. The plaintiff appears to focus her allegations of error on her claims under 42 U.S.C section 1983 and apparently abandons further appeal of the remainder of her original "claims," including her R.I.C.O "claims" 18 U.S.C. §1961 to 1968) and those brought under 42 U.S.C. §1985.

REASONS FOR DENYING THE WRIT

A. THE DISTRICT COURT CORRECTLY DISMISSED THE CIVIL RIGHTS AND CONSPIRACY CLAIMS AGAINST DEFENDANT WILLIAMS BECAUSE THE AMENDED COMPLAINT FAILED TO ALLEGE STATE ACTION; DEPRIVATION OF CONSTITUTIONALLY PROTECTED RIGHTS; AND CLASS BASED DISCRIMINATION.

Plaintiff's amended complaint alleges a violation of 42 U.S.C. §1983. This section provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured. . . .

In pleading §1983 actions, "More is needed than a naked averment that a tort was committed under the color of state law." *Gittlemacker v. Prasse*, 428 F.2d 1, 6 (3d Cir. 1970).

> . . . the wrongdoing must amount to a deprivation of a right, privilege, or immunity secured by the Constitution and the laws of the United States. And this must be set forth with specificity; mere argumentative and conclusory allegations will not suffice.
>
> The requirement of some semblance of factual specificity becomes necessary if the Federal courts are to exercise jurisdiction under the Civil Rights Act. Without a proper allegation of Constitutional deprivation, an action requesting damages for personal injuries sounds only in common law or statutory tort and, because no federal interest is involved, is triable only under state law in a state court.

Id.

Plaintiff's amended complaint pleads no facts indicating that defendant Williams, acted under color of state law. Nor does the complaint set forth with specificity the right or privilege infringed by defendant Williams' conduct. A review of the amended complaint demonstrates that it contains nothing more than conclusory and boiler plate language. Thus, it was not abuse of discretion for the trial court to dismiss the §1983 count against defendant Williams.[1]

B. THE DISTRICT COURT WAS NOT OBLIGATED TO GRANT PLAINTIFF LEAVE OF COURT TO FILE A SECOND AMENDED COMPLAINT BECAUSE PLAINTIFF NEVER MOVED TO DO SO AND AN AMENDED COMPLAINT WOULD BE IN VAIN BECAUSE OF APPLICABLE STATUTE OF LIMITATIONS AND IMMUNITY.

At p. 19 of her Court of Appeals brief, plaintiff concedes that her "pleadings were technically deficient regarding fact," thus confirming the argument defendant Williams makes in the preceding portions of this brief. However, plaintiff argues that the trial court erred in not allowing her leave of court to amend her complaint a second time. This argument is without merit. Although leave to amend is to be freely given, granting same is committed to the sound discretion of the trial

---

[1] The district court was correct in dismissing the plaintiff's allegations under R.I.C.O. and §1985. Plaintiff's amended complaint fails to plead a cause of action under 42 U.S.C. §1985, since it speaks only of "spouses of wealthy, powerful and prominent men," does not allege *facts* of a conspiracy to deprive her of a constitutionally protected right and does not identify the constitutionally protected right. Plaintiff's amended complaint failed to allege a R.I.C.O. violation against defendant Williams, since she failed to identify: predicate acts; a distinct enterprise; injury to business or property; and a nexus to interstate commerce. 18 U.S.C. §1962(c) and (d). Since the plaintiff has not petitioned this Honorable Court for review of these issues, defendant Williams will not address them in detail.

court. *Gay v. Petsock*, 917 F.2d 768 (3d Cir. 1990). In the case at bar, the trial court did not abuse its discretion. Plaintiff had once previously been allowed to amend her complaint. It was the amended complaint that was being scrutinized in the various motions to dismiss. Further, plaintiff never formally requested leave of court to amend a second time despite a previously issued court order, entered on November 29, 1995, which directed that no amended complaints be filed except upon leave of court. The trial court even went as far as to instruct the plaintiff concerning the procedure by which she could seek leave to amend a second time. Plaintiff acknowledges as much in her Court of Appeals brief at p. 20:

> The District Court was well aware on November 29, 1995, after the case management conference, that the plaintiff intended to file a second amended complaint. When opposing counsel became aware of the plaintiff's intention to file a second amended complaint, they voiced their concerns to the Court and charged that the *pro se* plaintiff intended to file a second amended complaint without leave of court; *whereupon the District Court informed the plaintiff of the procedure by which she could seek leave of Court to amend her complaint. The Court also instructed the plaintiff that she should file a Motion and attach a copy of the proposed amended complaint to the motion so that it could be reviewed by the Court.* However, no date was set by which the plaintiff was required to file her Motion for Leave to File the Second Amended Complaint. *Plaintiff's Brief*, p. 20. (Emphasis added).

Despite acknowledging these specific instructions from the Court, plaintiff *never* filed a motion seeking leave to amend a second time. As a matter of fact, it was not until after the Court ruled on the various motions to dismiss that the plaintiff complained she should be allowed to amend a second time. Plaintiff is seemingly of the position that the trial court should have acted as more of an advocate to her position by counseling her on dates and times within which to file a second

amended complaint. Her position is ludicrous. Although she was acting without a lawyer, she could not expect the Court to hold her hand and walk her through the process step by step. Plaintiff choose not to file a motion to seek leave to amend a second time and, therefore, cannot now complain that the trial court abused its discretion in not granting a motion that was never filed. In *Coates v. Illinois State Board of Education*, 559 F.2d 445 (7 Cir. 1977), the Court of Appeals held the trial court "did not abuse its discretion in denying leave to amend the complaint, because such leave was never sought." *Id.* at 451.

Also, to permit the plaintiff to amend her amended complaint at this late date would prejudice defendant Williams in her defense of plaintiff's claims.

Even if the trial court were to allow plaintiff to amend a second time, the effort would be in vain because plaintiff's claims are barred by doctrines of immunity and applicable statute of limitations.

According to her amended complaint, the plaintiff's claims against defendant Williams stem from a state court proceeding in which plaintiff alleges Williams took "incomplete and untruthful court transcripts" (*see, plaintiff's amended complaint, ¶28(c)*). Plaintiff also asserts that defendant Williams testified "falsely regarding the identity of the person whom she admitted instructed her not to include testimony taken under oath in the official court record." *See, plaintiff's complaint*, ¶58 (10). While her amended complaint does not set forth dates upon which Williams' conduct allegedly took place, judicial notice of documents filed in the underlying state court action, and previously made part of the District Court record, demonstrate that the alleged incomplete and false reporting of testimony occurred on November 16, 1989 and that plaintiff was aware of same as early as June 18, 1991. This is evidenced by a petition plaintiff filed in state court to "set aside and abrogate the property settlement." Plaintiff's complaint against defendant Williams was not filed until September 5, 1995, or four years and three months after

plaintiff became aware of the existence of and source of an alleged injury. The civil rights complaint filed by the plaintiff has a two year statute of limitations as provided by 42 P.A.C.S. §5524. *See Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir. 1985). A federal claim accrues "as soon as a potential claimant is aware, or should be aware, of the existence of and source of injury." *Oshiver v. Levin, et al.* 38 F.3d 1380, 1384, n. 1 (3d Cir. 1994). It is upon awareness of actual injury, not upon awareness that the injury constitutes a legal wrong, that a federal claim accrues. *Oshiver*, 38 F.3d at 1386. Since more than two years have elapsed from the time the plaintiff was made aware, or should have been aware, of the source of a potential claim against Ms. Williams, the statute of limitations has run and her claims are time barred.

Plaintiff also alleges that defendant Williams testified falsely in the underlying state court action. However, this Honorable Court specifically addressed the issue of absolute witness immunity in §1983 actions in the case of *Briscoe v. Lahue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L.ed. 2d 96 (1983). There, this Court held:

> In short, the common law provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process. It is equally clear that §1983 does not authorize a damages claim against private witnesses on the one hand, or against judges or prosecutors in the performance in their respective duties on the other.

Briscoe, 460 U.S. at 336.

Thus, any claims plaintiff has against Williams concerning her testimony as a private witness in the underlying state court action are barred by absolute witness immunity.

Thus, even if the plaintiff were allowed to amend her complaint a second time, such amendment would be in vain because her claims are barred by absolute immunity and the statute of limitations.

Finally, the plaintiff is precluded from pursuing an action in federal court which seeks collateral review of a prior state court decision.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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No. 96-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CAROLEE A. MEDICO,

Petitioner,

v.

CHARLES P. MEDICO, LAWRENCE MACDONALD, PATRICK J. TOOLE, JR., THOMAS A. MAKOWSKI, SUSAN LATONA, CHESTER MUROSKI, CORREALE STEVENS, DONALD O'MALLEY, CATHERINE DAVIS, SANDOR YELEN, MAXINE WILLIAMS, HUGH F. MUNDY, EUGENE DUFFY, ANTHONY TERRACCIANO, FIRST FIDELITY BANK, N.A., PENNSYLVANIA, ROBERT E. COLVILLE, MICHAEL J. DiMARCO and DONALD D. DOLBIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTHONY TERRACCIANO, FIRST FIDELITY BANK, N.A., PENNSYLVANIA, and MICHAEL J. DiMARCO

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court below properly affirm the district court's dismissal with prejudice of an amended complaint for failure to state a claim upon which relief could be granted, where the amended complaint did not differ in any material respect from the original complaint as to those defendants, where plaintiff was given an opportunity to further amend her complaint but did not do so, and where plaintiff has never specified the substance of the additional allegations she would set forth as to those defendants in any further amended complaint?

STATEMENT OF THE PARTIES

First Union Corporation is the parent of respondent First Fidelity Bank, N.A., Pennsylvania, which is now known as First Union National Bank.

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COUNTERSTATEMENT OF THE CASE

Petitioner Carolee Medico initiated this action on May 26, 1995, against her estranged husband, Charles Medico; Mr. Medico's attorney, Lawrence MacDonald; several judges in the Pennsylvania Court of Common Pleas of Lackawanna County (respondents Donald Dolbin, Hugh Mundy and Patrick Toole); and First Fidelity Bank, N.A., Pennsylvania and Anthony Terracciano (an officer of First Fidelity).[1] She alleged violations of 42 U.S.C. § 1983 and § 1985, and the Fourteenth Amendment to the Constitution of the United States.

After First Fidelity and Mr. Terracciano moved to dismiss petitioner's complaint, setting forth in detail its deficiencies as to them, petitioner filed an amended complaint. The amended complaint named eleven additional defendants, including Michael DiMarco, Esquire, an attorney who had represented First Fidelity in a mortgage foreclosure action brought against Ms. Medico and her estranged husband.[2] In addition to the claims under §§ 1983 and 1985, the amended complaint purported to set forth claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 to 1968 ("RICO"), 42 U.S.C. §§ 1982, 1986 and 1988, and the First, Fourth, Fifth, Sixth, and Thirteenth Amendments to the Constitution.

With regard to the First Fidelity respondents, the amended complaint alleged that First Fidelity and Mr. Terracciano, on behalf of First Fidelity, extended a mortgage to Mr. Medico on the marital home that he shared with petitioner; that First Fidelity and Mr. Terracciano "joined together" with Mr. Medico to keep petitioner unaware that he had failed to make payments on the mortgage for several years; that First Fidelity brought a foreclosure action against the Medicos for nonpayment of the mortgage; and that in the course of the proceedings in the foreclosure action, Mr. DiMarco (First Fidelity's attorney) contacted certain judges in the Pennsylva-

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1. Since the district court entered the orders from which Ms. Medico appeals, First Fidelity Bank, N.A., Pennsylvania, has become First Union National Bank.

2. First Fidelity, Mr. Terracciano and Mr. DiMarco are referred to herein collectively as "the First Fidelity respondents."

nia Court of Common Pleas concerning scheduling of hearings, with copies of his letters sent to petitioner. These allegations were identical in every respect to the allegations that petitioner made against the First Fidelity respondents in her original complaint. Despite having the benefit of the arguments set forth by the First Fidelity respondents as to the deficiencies in her complaint, petitioner did not take the opportunity to correct those deficiencies in the amended complaint, which did not include even one new or revised allegation against the First Fidelity respondents.[3]

Nowhere in the amended complaint did petitioner allege that the First Fidelity respondents were agents of any governmental entity, that they performed functions generally associated with government or delegated to them by government, or that they received any funds from government.

All defendants, including the First Fidelity respondents, moved to dismiss the amended complaint. Following a telephonic case management conference on November 25, 1995, in which petitioner and counsel for all defendants participated, the district court entered an order providing that "no amended complaint shall be filed except upon leave of court." Petitioner never sought leave to file a second amended complaint, nor did she ever specify to the Court or any party what additional allegations she would include in such a complaint.

On February 1, 1996 — more than two months after the case management conference — the district court entered an Opinion and Order dismissing, with prejudice, the amended complaint as to all defendants, including the First Fidelity respondents. The court determined, *inter alia,* that the amended complaint failed to state a claim as to the First Fidelity respondents under § 1983. By Order dated April 10, 1996, the district court denied petitioner's motion for reconsideration. The district court explicitly addressed and rejected Ms. Medico's contention that it was error for the court to dismiss the amended complaint because she was proceeding *pro se*

3. Although Mr. DiMarco was added as a defendant in the amended complaint, the allegations referring to him were identical to those referring to him in the original complaint.

and therefore should have been given an opportunity to amend the amended complaint.

On appeal to the court below, petitioner did not argue any claims but those asserted under § 1983. She also did not challenge in her briefs the district court's dismissal of the First Fidelity respondents. On February 6, 1997, the court below entered a judgment order affirming the district court's dismissal of petitioner's amended complaint.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

This case presents no issue worthy of *certiorari.* Petitioner's only stated ground for *certiorari* is her disagreement with the district court's decision to dismiss the amended complaint without allowing her unlimited time in which to seek leave to file yet another amended complaint. This is not an issue requiring review by this Court.[4] That issue is a well-settled matter of civil procedure, as to which there is no conflict between the decision of the court below and the precedents of any other Court of Appeals or of this Court. The district court's decision to grant or deny leave to file successive amendments under Rule 15(a) of the Federal Rules of Civil Procedure is a matter of discretion, and its refusal to permit additional amendments is reversible only if that discretion was abused. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971). The circumstances of this case demonstrate that the district court exercised its discretion properly.

The premise of the petition for *certiorari* is Ms. Medico's belief that she was entitled to yet another bite at the apple before the district court dismissed her action. At least as to the First Fidelity respondents, that premise is flawed. With the benefit of knowing the arguments relied upon by the First

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4. Petitioner bases her argument on Rule 15(a) of the Federal Rules of Civil Procedure and on the abstention doctrine. The First Fidelity respondents did not raise an abstention argument below, and accordingly confine their argument here to the Rule 15(a) issues.

Fidelity respondents in their motion to dismiss the original complaint, Ms. Medico had every opportunity to include in the amended complaint that she did file new allegations against them that might have stated a claim. Yet, even with that benefit, she did not alter or supplement in any way the allegations as to the First Fidelity respondents. While leave to amend "shall be freely given when justice so requires," Rule 15(a) does not contemplate permitting endless, fruitless amendments.

Petitioner relies almost exclusively on her status as a *pro se* litigant in arguing that she was entitled to more than her fair share of amendments, citing *Kauffman v. Moss,* 420 F.2d 1270 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970). However, the dismissal at issue in *Kauffman* was of an original complaint that had never been amended. *Kauffman* is of no assistance to petitioner, who *did* amend her complaint and was offered, *but did not act on,* an additional opportunity to do so again. While a *pro se* complaint must be construed liberally, *see Haines v. Kerner,* 404 U.S. 519, 520 (1972), that does not mean that a *pro se* plaintiff such as petitioner may maintain an action where she has utterly failed on at least two occasions to allege essential elements of the claims she seeks to assert. Such is the case here. The district court properly dismissed the amended complaint for failure to state a claim after fully taking into account Ms. Medico's status as a *pro se* litigant, liberally construing the amended complaint, and giving her every opportunity further to amend the amended complaint and at the very least to describe with some degree of specificity her proposed amendments. Its holding, and the affirmance of the court below, is entirely consistent with this Court's precedents.

Ms. Medico has not raised in her petition any issues relating to the substance of her amended complaint or the propriety of the district court's dismissal for failure to state a claim on which relief may be granted. Nor has she stated how she would further amend her amended complaint to state a claim against the First Fidelity respondents. Her petition is limited to procedural arguments only. Accordingly, she has failed to

preserve her arguments on the substance of any of the district court's holdings, affirmed by the court below, as to the merits of her claims.

CONCLUSION

For the foregoing reasons, the First Fidelity respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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